

**XTREMESPECTRUM, INC.**  
**TIME DOMAIN CORPORATION**  
**DANDIN GROUP**

Ms. Magalie Salas, Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington DC 20554

**Re: ET Docket 98-153**  
**Revision of Part 15 of the Commission's Rules Regarding Ultra-**  
**Wideband Transmission Systems**

*Ex Parte Communication*

Dear Ms. Salas:

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, and on behalf of XtremeSpectrum, Inc., Time Domain Corporation, and Dandin Group, we are filing this written *ex parte* communication for inclusion in the above-referenced docket.

This letter responds to the filing by Air Transport Association of America, Inc., *et al.* ("ATAA *et al.*") of March 27, 2001, insisting on a Further Notice of Proposed Rulemaking in this proceeding. ATAA *et al.* offer two reasons why they believe a Further Notice is necessary: (1) the NPRM did not detail specific rule language, and (2) interested parties will not otherwise have an opportunity to comment on the final rules.

The first ground is incorrect as a matter of law; the second is premature.

ATAA *et al.* suggest an NPRM must provide the text of proposed rules. The Administrative Procedure Act says otherwise. The APA requires that notice include

*either the terms or substance of the proposed rule or a description of the subjects and issues involved.*<sup>1</sup>

Here, the NPRM included both the substance of the proposed rules (although not the terms) and a full description of all subjects and issues involved. The APA requirements are amply satisfied.

As their second ground, ATAA *et al.* contend that the public will not have had a fair opportunity to comment on the final rules. This point is premature, for its validity turns on what rules the Commission ultimately seeks to adopt. "An agency, after all, must be free to adopt a

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<sup>1</sup> 47 U.S.C. Sec. 553(b)(3) (emphasis added).



final rule not described exactly in the [notice of proposed rulemaking] where the difference is sufficiently minor, or agencies could not change a rule in response to valid comments without beginning the rulemaking anew."<sup>2</sup>

The courts have consistently held that a Further Notice is unnecessary where the adopted rules are a "logical outgrowth" of those proposed.<sup>3</sup> A final rule fails to be a logical outgrowth, and hence requires a Further Notice, only "when the changes are so major that the original notice did not adequately frame the subjects for discussion."<sup>4</sup> A Further Notice is unnecessary where the NPRM provides sufficient information to permit "adversarial critique."<sup>5</sup>

This proceeding has seen an abundance of adversarial critique. As of today, the record includes 563 separate submissions, comprising many thousands of pages. Nearly all of this accumulation, including many filings by the co-signers of ATAA *et al.*, is directed toward the very specific technical proposals in the Notice -- the same proposals that ATAA *et al.* now contend are inadequately specific for comment.

Only a radical departure from the framework set out in the Notice would warrant the sort of relief sought by ATAA and its co-signers. The record in this proceeding provides ample support for the Commission to adopt rules that would fall well within the logical outgrowth of the NPRM. Accordingly, no Further Notice is necessary.

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<sup>2</sup> National Cable Television Ass'n v. FCC, 747 F.2d 1503, 1507 (D.C. Cir. 1984), *quoted in* Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 729 (D.C. Cir. 2000).

<sup>3</sup> *See* Omnipoint Corp. v. FCC, 78 F.3d 620 631 (D.C. Cir. 1996) ("In deciding whether a second round of comment is required, this Court looks to see 'whether the final rule promulgated by the agency is a "logical outgrowth" of the proposed rule," *citing* American Water Works Ass'n. v. EPA, 40 F.3d 1266, 1274 (D.C. Cir. 1994)).

<sup>4</sup> Omnipoint Corp. v. FCC, 78 F.3d at 631-32, *citing* Connecticut Light and Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 533 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982).

<sup>5</sup> Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).



Ms. Magalie Salas  
Page 3

In reaching its final rules, the Commission must complete and evaluate the record based on the present Notice, including the technical studies submitted in response. XtremeSpectrum, Time Domain, and Dandin urge the Commission to devote all of its available resources to that task, and to resist the efforts by ATAA *et al.* to distract and delay.

Respectfully submitted,

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